THE HON'BLE SRI JUSTICE P.S.NARAYANA

Writ Petition Nos.6846 and 17527 of 2007

Date: December, 2007

Between :-

W.P.No.6846/2007

S.Ravi Kanth .. Petitioner

And

The A.P.Mahesh Cooperative Urban Bank Ltd.,
Regd.Office 5-3-89, III Floor, N.S.Road,
Hyderabad, rep. by its Authorized Officer,
Under Securitisation Act, 2002
(Central Act 54 of 2002) and 3 others ..
Respondents

W.P.No.17527 of 2007

M/s.Shila Homes, a partnership firm
Rep. by its Managing Partner
Mr.PVSN Murthy,
Having registered Office at 6-5-563/A2,
Erramanzil, Hyderabad – 82 ..
Petitioner

And

The A.P.Mahesh Cooperative Urban Bank Ltd.,
Regd.Office 5-3-89, III Floor, N.S.Road,
Hyderabad, rep. by its Authorized Officer. ..
Respondent

THE HON'BLE SRI JUSTICE P.S.NARAYANA

Writ Petition Nos.6846 and 17527 of 2007

COMMON ORDER:-

Heard Sri K.V.Simhadri and Smt.Vedavani, the Counsel representing the writ petitioners in these Writ Petitions and also Sri Ravi Kondaveeti and Sri Y.Ramatheertha, Counsel representing the respondents.

2. W.P.No.6846/2007 is filed by one S.Ravi Kanth, praying for a Writ of Mandamus declaring the action of the A.P.Mahesh Cooperative Urban Bank Ltd., in filing the Crl.M.P.No.954/2002 under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter in short referred to as 'the Act' for the purpose of convenience) before the Chief Metropolitan Magistrate, Hyderabad without first issuing the mandatory notice u/s.13(4) of the Act is arbitrary, illegal and violative of the Act and also violative of principles of natural justice and consequently set aside the Order of the Chief Metropolitan Magistrate passed in Crl.M.P.No.954/2002, dt.16-3-2007 appointing an Advocate Commissioner to take over possession of the petition schedule property insofar as it concerns the petitioner's property in Flat No.102 in 2nd

Floor (Northern side) of “Murthy Mansion” admeasuring 1650 sq.ft (including balcony, car parking and common are) together with proportionate undivided share in the land measuring 49.3 sq.yds, out of the total land measuring 691 sq.yds., in the premises bearing M.C.H.No.8-3-167/D19 in Survey No.137, on Plot No.19, situated at Kalyan Nagar, Phase-I, Yousufguda, Hyderabad and pass such other suitable orders.

3. W.P.No.17527/2007 is filed by M/s.Shilpa Homes, a partnership firm, represented by its Managing Partner praying for a Writ of Mandamus declaring the action of the respondent – A.P.Mahesh Cooperative Urban Bank Ltd., in filing Crl.M.P.No.954/2002 under Section 14 of the Act without issuing the mandatory notice under Section 13(4) of the Act is arbitrary, illegal and violative of the Act and also violative of principles of natural justice and consequently set aside the order of the Chief Metropolitan Magistrate made in Crl.M.P.No.954/2002 dt.16-3-2007 and order payment of costs as per the letter dt.19-12-2006 as directed by the Debts Recovery Appellate Tribunal in RA (SERFAEASI) No.42 of 2006 and pass such other suitable orders.

4. This Court issued *rule nisi* in W.P.No.6846/2007 on 10-9-2007. On 5-4-2007 this Court made the following

order:-

> *"Pending further orders in the Writ Petition, there shall be stay of all further proceedings pursuant to the order dated 16-3-2007 of the learned Chief Metropolitan Magistrate, Hyderabad in Crl.M.P.No.954 of 2002, including taking possession of the property bearing Flat No.102 (Northern side), 2nd floor, Murthy Mansion and admeasuring 1650 sq.fts., together with proportionate undivided share in the land measuring 49.3sq.yards out of the total land measuring 691 sq.yds in premises bearing M.C.H. No.8-3-167/D19 in survey No.137, Plot No.19, Kalyan Nagar, Phase-I, Yousufguda, Hyderabad.*
>
> *Notice."*

5. It is brought to the notice of this Court that there is a connected Writ Petition and hence it was directed to list W.P.No.6846/2007 along with W.P.No.17527/2007.

6. In W.P.No.17527/2007 *rule nisi* was issued on 20-8-2007 and while ordering *notice* in W.P.M.P.No.22430/2007 *pending further orders, interim stay as prayed for* had been granted.

7. M/s.Shilpa Homes, the writ petitioner in W.P.No.17527/2007, is shown as 2nd respondent in W.P.No.6846/2007. In view of the commonality of both facts and law involved in both these Writ Petitions, these Writ Petitions are being disposed of by this common order.

8. Sri Simhadri, the learned Counsel representing the writ petitioner in W.P.No.6846/2007 had taken this Court through the averments made in the affidavit filed in support of the Writ Petition, the series of events, how the petitioner purchased the property and how the notice had been affixed at the premises of the petitioner and how the property of the petitioner was not shown even in the notice. The learned Counsel traced the historical background of the litigation commencing from the arbitration proceedings and the original Award made in this regard and how the property of the petitioner was not shown and subsequent thereto how the same had been amended to include the property of the petitioner as well. The learned Counsel also while elaborating his submissions had taken this Court through the sequence of events and would maintain that the Award is *nonest* in the eye of law and the appeal filed by the borrowers had been allowed by the Appellate Tribunal, Chinnai. The learned Counsel also pointed out to certain other proceedings and the Orders made therein. The learned Counsel also would maintain that the Banking Institution being a Cooperative Bank, it would not fall within the meaning of the Banking Company and it is doubtful whether the provisions of the Act can be invoked in this

regard. The learned Counsel also contended that notice under Section 13(4) of the Act being mandatory, without exhausting the same, Section 14 of the Act cannot be straight away invoked. Incidentally, the learned Counsel also had drawn the attention of this Court to Section 81 of the Transfer of Property Act, 1882.

9. Smt.Vedavani, the learned Counsel representing the writ petitioner in W.P.No.17527/2007 incidentally who is also shown as one of the respondents as R.2 in W.P.No.6846/2007, had explained the clear directions made by the D.R.A.T. and would maintain that those directions are not followed by the Banking Institution. The learned Counsel also contended that notice under Section 13(4) of the Act being mandatory, without exhausting the same, Section 14 of the Act cannot be straight away invoked. The learned Counsel while making elaborate submissions had drawn the attention of this Court to different provisions of the Act and also the Rules made thereunder and would maintain that not only the directions of the D.R.A.T. had not been followed by the Banking Institution in question, further the impugned proceedings are liable to be quashed since the mandatory notice under Section 13(4) of the Act had not been given before resorting to the invocation of Section 14 of the Act.

10. Sri Ravi Kondaveeti, the learned standing Counsel

representing the Cooperative Bank had taken this Court through the respective pleadings of the parties and the material placed before the Court and further explained the scope and ambit of Section 13(2), Section 13(4) and Section 14 of the Act as well and placed strong reliance on the decision of the Division Bench of the Madras High Court and also the Division Bench of the Bombay High Court and would maintain that in the light of the views expressed by both the Division Benches of the Madras High Court and the Bombay High Court as well, the stand taken by the writ petitioners to be negatived and in the light of the same, the directions of D.R.A.T. would fall into insignificance.

11. Sri Ramatheertha, the learned Counsel representing R.3 and R.4 had tried to distinguish the decisions on which reliance had been placed by Sri Ravi Kondaveeti and also would emphasize that in the light of Rule 8 and also the clear provisions of Section 13(2) and Section 13(4) of the Act, it may have to be held that a Banking Institution cannot resort to Section 14 of the Act without following the procedure under Section 13(4) of the Act. The learned Counsel also pointed out to Rule 9 of the Rules and ultimately would conclude that in such circumstances, unless the procedure as ordained by the

provisions of the Act and the Rules had been followed, no further proceedings can be further proceeded with.

12. Heard the Counsel and perused the material available on record.

13. In the affidavit filed in support of the Writ Petition, it is averred in W.P.No.6846/2007 that *the 1st respondent – A.P.Mahesh Cooperative Urban Bank Ltd., a Multi State Cooperative Bank, a Scheduled Bank, has been carrying on business all over India and hence it is a State within the meaning of the Article 12 of the Constitution of India. While narrating the brief facts which lead to the filing of the present Writ Petition, it is averred that the petitioner had purchased Flat No.102 in 2nd floor of "Murthy Mansion" admeasuring 1650 sq.fts. (including balcony, car parking and common area) together with proportionate undivided share in the land measuring 49.3 Sq.Yds., out of the total land measuring 691 Sq.Yds., in the premises bearing M.C.H.No.8-3-167/D19 in survey No.137, on Plot No.19 situated at Kalyan Nagar, Phase-I, Yousufguda, Hyderabad from respondents 2 to 4 herein vide registered sale deed dt.28-10-2002 bearing document No.3732 of 2002 for a valuable sale consideration. It is also stated that at present the flat is in occupation of the petitioner and also stated that he had purchased the said flat by*

obtaining loan from ICICI Home Finance Company Ltd., and at the time of purchase, he had made reasonable enquiry with regard to the marketable title of the respondents 2 to 4 by way of obtaining Encumbrance Certificate from the office of the Sub-Registrar, Banjara Hils, Hyderabad, which showed that the same is in the name of respondents 2 to 4 and as such, there was no occasion for the petitioner to doubt their title. The petitioner also further states that the 2nd respondent had also written a letter to the ICICI Bank stating that they have sold the said flat to him, that the flat is not subject to any encumbrance, charge or liability and they have no objection for his mortgaging the said flat to the Bank by way of security for the loan obtained by him. While so, the respondents 2 to 4 herein appear to have obtained overdraft loan of Rs.50 lakhs from the 1st respondent bank by keeping certain movable and immovable properties as equitable mortgage and that on their failure to repay the loan, the 1st respondent Bank has filed Rc.No.28/05-03 under Section 84 of the Multi State Cooperative Societies Act 39 of 2002 in the Court of the Central Registrar/Arbitrator for recovery of a sum of Rs.54,26,694/- and that after filing of the said case, the respondents 2 to 4 herein appear to have made certain

payments. However, the Central Registrar/Arbitrator had passed an Award on 17-11-2003 directing the respondents therein to repay the outstanding loan amount of Rs.28,46,958/- with further interest from 1-10-2003 giving two months time for Redemption of Award from 17-11-2003 and in case of failure the amount shall be recovered by attaching and sale of their properties mentioned in the schedule "A" and "B" and other movable and immovable properties, which does not include the property of the petitioner. The petitioner further stated that on his insistence, he was informed by the respondents 2 to 4 that his flat is not covered under the mortgaged immovable properties to the bank and that they have also given him letters of correspondence addressed by the 2nd respondent to the 1st respondent for release of the property from marriage before sale of flat. However, consequent to the said Award dt.17-11-2003, the 1st respondent bank has issued a notice under Section 13(4) of the Act on 25-8-2004 for attachment of the said property towards the loan obtained by respondents 2 to 4. Further the petitioner also averred that he questioned inclusion of his property for attachment by way of filing S.A.No.119/2004 before the Debts Recovery Tribunal at Hyderabad and obtained stay orders, dt.11-11-2004 in

I.A.No.1335/2004 on the ground that the Schedule-A and Schedule-B properties in Award, dt.17-11-2003 does not include his property and that in the meanwhile, the 1st respondent filed an application before the Registrar/Arbitrator for modification of the Award, dt.17-11-2003 and obtained a modification order on 13-9-2004 from the Registrar/Arbitrator for inserting his flat in the list of immovable properties for attachment. Further it is stated that challenging the above proceedings dt.13-9-2004 the petitioner filed W.P.No.20746/2004 on the file of this Court to set aside the order dt.13-9-2004 through which his property was included in the mortgaged list of properties. The same was dismissed by this Court by order dt.14-6-2005 observing as hereunder:-

> *"There is a dispute between the contestants as to whether the petitioner herein purchased the flat on the northern side of the second floor of the apartment block known as "Murthy Mansion", after the same was released for mortgage by the second respondent-Bank at the behest of the builder. Further it is brought to the notice of this Court that after obtaining necessary modification from the first respondent, the second respondent Bank issued Bank issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'Securitisation Act'). Challenging the same, the petitioner moved an*

appeal, application before the Debts Recovery Tribunal, Hyderabad, and obtained interim orders of stay of dispossession. As the second respondent-Bank claims right over the flat purchased by the petitioner by reason of the impugned order dated 13-9-2004, and as the petitioner also already impugned the said notice before the appropriate forum, this Court is of the considered opinion that the petitioner cannot be permitted to pursue two remedies simultaneously in relation to the same cause of action. As there are questions of fact involved in the matter, it would be in the interest of the petitioner himself to pursue the remedy under the Securitisation Act and seek redressal. Till the said matter is finally settled, in view of the orders passed by the Debts Recovery Tribunal, the second respondent-Bank has to seek appropriate orders from the Debts Recovery Tribunal before taking further action pursuant to the impugned Award."

Further it is stated that challenging the notice issued by the 1st respondent under Section 13(4) of the Act, the 2nd respondent also filed S.A.No.85/2004 on the file of Debts Recovery Tribunal and the same was allowed in part by the Tribunal by an order dt.5-10-2005 setting aside the notice issued under Section 13(4) of the Act observing that the Bank has not complied with Rule 8(2) of the Act before issuing the said notice and holding that there is no need to issue notice under Section 13(2) afresh.

Challenging the same, the 2nd respondent filed an appeal before the Debts Recovery Appellate Tribunal, Chennai in RA(SARFAESI) No.42/2006 challenging the very proceedings under the Act while proceedings under arbitration are pending. The Debts Recovery Appellate Tribunal at Chennai allowed the RA(SARFAESI) No.42/2006 in part by order dt.26-10-2006. Meanwhile as per the order of the Appellate Tribunal, the 2nd respondent had also deposited a sum of Rs.7 lakhs with the 1st respondent-Bank. The said RA(SARFAESI) No.42/2006 before the Debts Recovery Appellate Tribunal, Chennai, appears to have been filed by M/s.Shila Homes, a Partnership firm, and also P.V.S.N.Moorthy. The relevant portion of the said order reads as hereunder:-

> *"The apprehension of the appellants appears to be that they would not be allowed to raise all the contentions, which they have already raised in the application filed before the Debts Recovery Tribunal and, therefore, their right would be prejudiced. It is also further submitted that the appellants have already incurred the payment of Court fees and no cost was awarded by the Debts Recovery Tribunal and if the appellants have to challenge the measures that would be taken by the respondent once again under Section 13(4), they have to pay Court fee once again, which would unnecessarily burden the appellants.*

As far as the first contention of the appellant is concerned, I would like to make it clear that the appellants are always at liberty to raise all the contentions, which they have already raised and they are also entitled to raise further contentions on the measures that would be taken by the respondent under Section 13(4) and they would not be precluded at all from raising all the contentions and therefore the first contention of the appellants is answered accordingly.

As far as the second contention of the appellants that they have to spend amount for the Court fee for the second time, if they were to challenge the measures that would be taken by the respondent under Section 13(4) of the Act, requires consideration. As the DRT had set aside the measures taken under Section 13(4) of the SARFAESI Act, the application filed by the appellants could have been allowed with cost, but no cost has been awarded. There is no provision for refund of the Court fee in the DRT Act. That in the said circumstances, I am able to perceive the hardship that would be caused to the appellant in paying the Court fee once again. Hence, I am included to set aside the Order of the Tribunal with regard to the cost alone, as I feel that the appellants are entitled to cost.

In the result, the appeal is allowed in part no doubt the order with regard to "no costs" passed by the Debts Recovery Tribunal, Hyderabad is set aside and it is held that the appellants are entitled to costs.

The appellants have filed an application for

waiver of the deposit as required under Section 18 of the Act, in which this Tribunal by its order dt.19-7-2006 directed the appellant to deposit a sum of Rs.7 lakhs with the respondent Bank and the said sum was also deposited by the appellants and it is with the respondent Bank. As the appellants have questioned the validity of the measures taken under Section 13(4) of the Act, and the same was allowed by the Debts Recovery Tribunal, and it was not questioned by the respondent Bank, the appellants pray for refund of the said amount.

Without prejudice to the rights and contentions of the appellants, the respondent Bank is hereby directed to keep the said amount of Rs.7 lakhs in an interest earning no lien account for a period of one year and if no action is taken by the respondent within the said time, the appellants are entitled to get back the amount.

Appeal is ordered accordingly."

It is further stated that the petitioner also filed O.S.No.107/2006 on the file of the Court of the II-Additional Chief Judge, City Civil Court, Hyderabad against the respondents for a declaration that the petitioner is the owner of the subject flat and the same is free from encumbrance, including the alleged mortgage between the respondents 2 to 4 and respondent 1 Bank and for other consequential reliefs. Pending the suit, the petitioner also filed an application I.A.No.1122/2006 for

interim injunction restraining the 1st respondent Bank from interfering with his peaceful possession enjoyment of the property and on 29-3-2006 an order of status quo was granted. The said order is still in force. The respondents are contesting the suit. Further it is stated by the petitioner that to his shock and surprise, suppressing all the above mentioned facts and without making the petitioner as a party respondent to the proceedings, the 1st respondent filed an application under Section 14 of the Act before the Court of the Chief Metropolitan Magistrate, Hyderabad bearing Crl.M.P.No.954/2007 praying for taking of physical possession of the property described in the schedule of property and hand over the same to it. Incidentally, the petitioner's property was also shown and the learned Chief Metropolitan Magistrate, by order dt.16-3-2007 appointed one Smt.A.Anantha Laxmi as Advocate-Commissioner and issued Advocate-Commissioner's Warrant directing her to take physical possession of the property and handover the same to the 1st respondent Bank. Pursuant to the said order, the learned Advocate Commissioner had issued a letter, dt.26-3-2007, fixing the date for taking physical possession of the scheduled property, which also includes the petitioner flat, on 7-4-2007 at 10.30 a.m.

Further it is also stated by the petitioner that the said notice was served on his tenant at flat No.102 and that after receiving the said notice, he had approached the Court of Chief Metropolitan Magistrate and verified in the office and noted down the contents of the application filed by the 1st respondent under Section 14 of the Act along with affidavit and list of documents attached to the petition. Certain grounds had been specifically raised and it is stated that *the action of the 1st respondent in approaching the Court of Chief Metropolitan Magistrate, Hyderabad, under Section 14 of the Act without first taking the recourse to Section 13(4) of the Act is arbitrary and illegal since notice under Section 13(4) of the Act before proceeding Section 14 of the Act is mandatory. Further it is stated that the 1st respondent should have seen that the earlier notice issued under Section 13(4), dt.25-8-2004 was set aside the Debts Recovery Tribunal, Hyderabad and the same was upheld by the Debts Recovery Appellate Tribunal, Chennai and it was also further observed by the Appellate Tribunal in its order dt.26-10-2006 that the 2nd respondent herein is always at liberty to raise all the contentions, which they have already raised and they are also entitled to raise further contentions on the measures that would be taken by the*

respondent under Section 13(4) and they would not be precluded at all from raising all the contentions. This shows that there was a specific direction to the 1st respondent to issue Section 13(4) Notice giving opportunity to the 2nd respondent. The petitioner is neither borrower nor guarantor to the alleged marriage loan but he is bona fide purchaser of flat and is in possession and that therefore, not following the same has resulted in violation of the petitioner's valuable right of defence. It is also averred that the 1st respondent should have the petitioner as a party to the proceedings before the Chief Metropolitan Magistrate, Hyderabad and that the 1st respondent was well aware of the petitioner interest in the petition schedule property of Crl.M.P.No.954/2007. Further it is averred that the 1st respondent herein obtained the order under Section 14 of the Act suppressing the fact that there is an order of status quo over the property of the petitioner made by the II-Additional Chief Judge in I.A.No.1122/2006 in O.S.No.107/2006. It is also stated that the claim of the 1st respondent in the affidavit filed in Crl.M.P.No.954/2007 before the Chief Metropolitan Magistrate that they went to the petition schedule property on 27-12-2006 which is factually incorrect as there is no occasion for the Bank to

approach the premises to take possession without following the due process of law and that the petitioner had been informed by his tenant that nobody visited the premises on 27-12-2006 and he had received only on 27-3-2007 the letter of the Advocate Commissioner, dt.26-3-2007 along with order dt.16-3-2007. Further it is stated that the 1st respondent should have seen that there is a dispute as to whether the petitioner had purchased the property after release of the same from mortgage or not and the same is yet to be decided by a competent Court. It is also stated that the 1st respondent should have seen that as per the Award of the Registrar/Arbitrator, dt.17-11-2003, there are other valuable properties mentioned in Schedule-A to the said order which are mortgaged with the 1st respondent Bank towards security for the loan obtained by the respondents 2 to 4 and that the 1st respondent, for the reasons best known to him, instead of proceeding against those properties, proceeding against petitioner's property which is under dispute and which action is highly unjustified. Further it is also averred that even assuming that petitioner's property is under mortgage, the 1st respondent should have seen that as per clause-10 of Deed of Mortgage, dt.14-6-2002, it was

incumbent upon him to release one flat at least now on payment of 25% of the outstanding loan including interest as on the date of payment and that the 2nd respondent had already paid an amount of Rs.7 lakhs as against the total outstanding of Rs.37 lakhs as on the date of deposit of Rs.7 lakhs and as such the 1st respondent should have released one flat and also in view of earlier correspondence of 2nd respondent with the 1st respondent before the property is purchased. It is also stated by the petitioner that the respondents herein are connived with each other and are trying to deprive him of his valuable property and they are trying to secure his property by all means without any opportunity of putting for his grievance before the Debts Recovery Tribunal. It is also stated that the order passed by the Chief Metropolitan Magistrate under Section 14 of the Act cannot be called in question before any Court, more particularly before the Debts Recovery Tribunal under Section 17 of the Act and as such, the petitioner had no other alternative remedy except to approach this Court under Article 226 of the Constitution of India. It is further averred by the petitioner that for all the above reasons, he had made out a prima facie case and the balance of convenience is in his favour to stay all further proceedings

pursuant to the order dt.16-3-2007 of the Chief Metropolitan Magistrate in Crl.M.P.No.954/2007 including taking over of possession of his property by the Advocate-Commissioner on 7-4-2007 at 10.30 a.m., otherwise he stands to suffer irreparable loss and prejudice.

14. In para 5 of the counter affidavit of R.1, it is stated that *the petitioner is having an alternative remedy provided under Section 17 of the Act and the 1st respondent Bank is registered under the Multi State Co-operative Societies Act and hence it is not a "State" within the meaning of Article 12 of the Constitution of India. It is also stated that without prejudice to the above contentions, it is submitted that the Vendors of the petitioner approached the 1st Bank and requested to sanction loan of Rs.50.00 lakhs for development of their construction business and accordingly, the 1st Bank sanctioned loan for an amount of Rs.50.00 lakhs in their favour and that as security for the loan, the vendors of the petitioner executed a Mortgage Deed on 14-6-2002 in favour of Bank mortgaging the semi-finished flats situated on the norther side of I Floor, II Floor and V Floor and the Flat situated on the souther side of the V Floor each admeasuring 1650 sq.ft., along with undivided share of*

land admeasuring 276.4 sq.yards out of total land admeasuring 698 sq.yards in 'Murthy Mansion' in the premises MCH No.8-3-167/D/19 in S.Nos.52, 138 and 139 situated at Yousufguda, Hyderabad and also stated that at that particular point of time, Flat numbers were not assigned as they were in semi-finished stage. Further it is also stated that in the mortgage deed, the Floor numbers were counted as Stilt plus five upper floors as stated by the Vendors of the petitioner and that in the mortgage deed it was agreed that the mortgagee i.e., 1st respondent Bank would release one Flat on payment of 25% outstanding loan, including interest as on the date of payment and accordingly, on payment of certain amounts, out of the four Flats mortgaged, the Flat on the northern side of I Floor and the Flat on Southern side of V Floor (two flats) were released on 15-4-2004. It is also further stated that that the petitioner purchased Flat No.102 in II Floor on Northern side of 'Murthy Mansion' admeasuring 1650 sq.ft. together with proportionate undivided share in the land measuring 49.3 sq.yds., in the premises bearing MCH No.8-3-167/D-19 on Plot No.19 situated at Kalyan Nagar, Yousufguda, Hyderabad from 1) Sri C.Murali Mohan Sastry, (2) Sri C.Tarakam and (3) M/s. Shilpa Homes, Erramanzil, Hyderabad by way of registered sale

deed dated 28-10-2002 and also stated that the above Flat was mortgaged on 24-6-2002 in favour of the 1st respondent Bank along with other properties as security for the loan taken by M/s.Shilpa Homes through registered mortgage deed document No.1980/2002 dated 14-6-2002 registered in the Office of the Sub-Registrar, Banjara Hills, Hyderabad. Further it is also stated that during the subsistence of the above mortgage, the petitioner purchased the said flat on 28-10-2002 and that therefore, the petitioner is not entitled to question the action of the 1st respondent Bank in issuing Possession Notice and proceeding under the Act for recovery of the loan amount. The petitioner knowing fully well that the above Flat was mortgaged in favour of the 1st respondent Bank, purchased the said Flat. When the 1st respondent Bank is going ahead for taking possession of the said Flat for selling the same, as the borrowers, who created mortgage against the above Flat are not repaying the loan instalments to the 1st respondent Bank, the petitioner filed this Writ Petition questioning the action of the 1st respondent Bank in filing Crl.M.P.No.954/2002 under Section 14 of the Act before the Chief Metropolitan Magistrate, Hyderabad and seeking to set aside the orders of the Chief Metropolitan Magistrate, dated 16-3-

2007 in Crl.M.P.No.954/2002 appointing the Advocate Commissioner to taken possession of Flat No.102 in II Floor on Northern side of 'Murthy Mansion' admeasuring 1650 sq.ft. together with proportionate undivided share in the land measuring 49.3 sq.yds., out of the total land measuring 691 sq.yds., in the premises bearing MCH No.8-3-167/D-19 in S.No.137 on Plot No.19 situated at Kalyan Nagar, Yousufguda, Hyderabad. Further it is averred that the petitioner is questioning the action of the 1st respondent Bank in filing Crl.M.P.No.954/2002 before the Chief Metropolitan Magistrate, on the ground that the 1st respondent Bank without first taking recourse to Section 13(4) of the Act and also stated that it is necessary to submit here that as per Section 13(2) of the Act, a notice has to be issued by the 1st respondent Bank to borrower to discharge his debt within sixty days from the date of notice, failing which the Bank is entitled to exercise all or any of the rights under sub-Section (4). Further it is stated that the 1st respondent Bank issued notice under Section 13(2) of the Act to the vendors of the petitioner on 25-4-2003 and that the vendors of the petitioner did not repay the loan amount even after receiving the said notice and that therefore, the 1st

respondent Bank issued Possession Notice under Section 13(4) of the Act on 25-4-2004. It is also stated that the vendors of the petitioner filed S.A.No.85/2004 and the petitioner filed S.A.No.119/2004 before the Debts Recovery Tribunal, Hyderabad and that the Debts Recovery Tribunal by orders dated 5-10-2005 in S.A.No.85/2004, set aside the Possession Notice dated 25-8-2004 issued by the 1st respondent Bank on the ground that the said Notice is not published in the Newspapers as required under Rule 8(2) of the said Act, but, however, the Debts Recovery Tribunal made it clear that "the Demand Notice issued under Section 13(2) holds good in law and that the respondent may take up proceedings that arise after 13 (2) of SARFAESI Act afresh." It is averred that the petitioner had withdrawn S.A.No.119/2004 filed by him before the Debts Recovery Tribunal. Further it is stated that questioning the orders dated 5-10-2005 passed by the Debts Recovery Tribunal, in S.A.No.85/2004, the Vendors of the petitioner filed R.A. (SARFAESI) 42/2006 before the Debts Recovery Appellate Tribunal at Chennai and the Debts Recovery Appellate Tribunal by order dt.26-10-2006, set aside the order of the Debts Recovery Tribunal passed in S.A.No.85/2004 with regard to costs alone and held that

the appellants in the R.A., are entitled to costs and that the remaining part of the Order dated 5-10-2005 passed by the Debts Recovery Tribunal, Hyderabad in S.A.No.85/2004 was not disturbed by the Debts Recovery Appellate Tribunal. Thereafter, the 1st respondent Bank authorities visited the secured assets on 27-12-2006 to take physical possession of the secured assets and that vendors of the petitioner prevented the Bank authorities to take the possession of the secured assets. Then the 1st respondent Bank filed Crl.M.P.No.954/2007 before the Chief Metropolitan Magistrate, Hyderabad, in which the Chief Metropolitan Magistrate had passed the orders on 16-3-2007 appointing an Advocate Commissioner to take over possession of the above properties. The Advocate Commissioner served notices to the vendors of the petitioner and also on the tenant of the petitioner, who is in possession of the above said Flat and the service of notice to the tenant of the petitioner is admitted by the petitioner in this Writ Petition. Further it is stated that questioning the action of the 1st respondent in filing the above Crl.M.P. before the Chief Metropolitan Magistrate and also questioning the orders dt.16-3-2007 passed by the Chief Metropolitan Magistrate in the Crl.M.P., the petitioner filed the present Writ Petition on the ground that

without taking recourse under Section 13(4) of the Act, the 1st respondent Bank filed the above Crl.M.P. and that this contention of the petitioner is not correct and misconceived. Section 13 of the Act deals with ***enforcement of security interest***. Section 13(4) of the Act reads as follows*:*

> *"In case the borrower fails to discharge his liability in full within the period specified in sub-Section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely –*
>
> *(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;*
>
> *(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:*
>
> *Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:*
>
> *Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.*
>
> *(c) Appoint any person (hereafter referred to as the manager), to manage the secured assets*

the possession of which has been taken over by the secured creditor;

(d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

Therefore, Section 13(4) of the Act is not contemplating that notice is to be issued before taking possession of the property. However, the Advocate Commissioner issued notice to the vendors of the petitioner and the tenant of the petitioner on 26-3-2007 that on 7-4-2007 possession of the said properties would be taken by the Advocate Commissioner and the same would be handed over to the 1st respondent Bank authorities. Rule 8(1) of the Rules framed under the Act reads as follows:

> *"Where movable secured assets is sold, sale price of each lot shall be paid as per terms of the public notice or on the terms as may be settled between the parties, as the case may be and in the event of default of payment, the movable secured assets shall be liable to be ordered for sale again."*

Para 2 and para 3 of the Appendix IV [Rule 8(1)] read as follows:

> *"The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described hereinbelow in exercise of powers conferred on him/her under Section 13(4) of the said Ordinance read with Rule 9 of the said rule on this ….. day of ….. of the year ……*
>
> *The borrower in particular and the public in general is hereby auctioned not to deal with the property and any dealings with the property will be subject to the charge of the …… (name of the Institution) for an amount of Rs…… and interest thereon."*

Therefore, after taking possession of the property, notice is to be issued to the borrower and general public. The 1st respondent Bank will take steps under Rules 8 and 9 of the Rules framed under the said Act after taking possession of the property. It is also stated that the petitioner filed this Writ Petition on misconception that he is to be issued notice before taking steps under Section 13(4) of the Act, but nowhere in the Act, it is contemplated that notice is to be issued either to the borrower or to any person before taking steps under Section 13(4) of the Act. However, the Advocate Commissioner issued notices to the borrowers and also to the tenant of the petitioner, who is in possession of the said Flat. It may be

appropriate to have a look at Rule 8 and Rule 9 of the Security Interest (Enforcement) Rules, 2002. Rule 8 dealing with ***sale of immovable secured assets*** reads as hereunder:-

> *(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.*
>
> *(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspaper, one in vernacular language having sufficient circulation in that locality, by the authorised officer.*
>
> *(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.*
>
> *(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed off.*
>
> *(5) Before effecting sale of the immovable property referred to in sub-rule (I) of rule 9, the authorised officer shall obtain valuation of the*

property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods :--

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

(6) the authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include, -

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not

be sold;

(d) time and place of public auction or the time after

which sale by any other mode shall be completed;

(e) depositing earnest money as may stipulated by the

secured creditor;

(f) any other thing which the authorised officer

considers it material for a purchaser to know in order to judge the nature and valuable of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the web-site of the secured creditor on the Internet.

(8) Sale by any methods other than public auction or public tender, shall he on such terms as may be settled between the parties in writing.

Rule 9 dealing with ***Time of sale, issue of sale certificate and delivery possession, etc.,*** reads as hereunder:-

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the

purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9 :

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the safe at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty five per cent of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been

complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer may issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

It is also stated that the vendors of the petitioner filed S.A.No.85/2004 and the petitioner filed S.A.No.119/2004

before the Debts Recovery Tribunal, Hyderabad. It is further stated that the petitioner also filed O.S.No.107/2006 before the II-Additional Chief Judge, City Civil Court, Hyderabad and apart from that the petitioner filed W.P.No.20746/2004 before this Court and the said Writ Petition was dismissed by this Court by order dt.14-6-2005 holding that the petitioner cannot pursue two remedies simultaneously in relation to the same cause of action and further holding that "as there are questions of fact involved in the matter, it would be in the interest of the petitioner himself to pursue the remedy under the Act and seek redressal." After dismissal of the above Writ Petition, the writ petitioner himself had withdrawn S.A.No.119/2004 filed by him before the Debts Recovery Tribunal. The same principles laid down by this Court in the order dt.14-6-2005 passed in W.P.No.20746/2004 is applicable in this Writ Petition also. It is also stated that the petitioner filed O.S.No.107/2006 before the II-Additional Chief Judge, City Civil Court, Hyderabad and the orders were granted by the Civil Court in I.A.No.1122/2006 in O.S.No.107/2006 on 29-3-2006 to maintain status quo till 19-4-2006. The petitioner had not filed any orders to show that the status quo order is extended thereafter and that the petitioner can pursue his remedies before the Civil Court and that he

cannot pursue two remedies simultaneously for the very same cause of action. Further in pars 14, 15 and 16 it was averred that the allegation of the petitioner that at the time of purchase of the Flat, he made reasonable enquiry with regard to the marketable title of respondents No.2 to 4 by obtaining Encumbrance Certificate from the Office of the Sub-Registrar, Banjara Hills, which showed that the same is in the name of respondents No.2 to 4 is not at all correct. The Encumbrance Certificate said to have obtained by the petitioner is dated 21-1-2005 and the date of purchase of the Flat by the petitioner is 26-10-2002 and that therefore, the contention of the petitioner that he bona fidely verified the marketable title of respondents 2 to 4 with regard to the above Flat is absolutely false. The other allegation of the petitioner that the 2nd respondent had written a letter to ICICI Bank stating that they have sold the said Flat to the petitioner, that the Flat is not subject to any encumbrance, charge or liability and they have no objection for mortgaging the said Flat to the Bank by way of security for the loan obtained by him is not tenable and that the letter said to have been issued by the 2nd respondent to ICICI Bank is not binding on the 1st respondent Bank and that if the vendors of the petitioner misrepresented with regard to the legality of their title in

respect of the above Flat, the petitioner has to take appropriate action against his vendors, but he cannot question the proceedings initiated by the 1st respondent Bank under the Act. The against of the petitioner that suppressing the facts, the 1st respondent Bank has filed Crl.M.P.No.954/2007 before the Chief Metropolitan Magistrate, Hyderabad is not correct and that the Crl.M.P. is filed as per the provisions of the Act only and it is also stated that an advance notice was also served to the tenant of the petitioner on 26-3-2007 by the Advocate Commissioner that the possession of the secured properties would be taken on 7-4-2007.

15. In W.P.No.17527/2006 it is stated that *the respondent is a State within the meaning of Article 12 of the Constitution of India and further it is stated that the petitioner firm approached the respondent Bank for necessary loan for its business needs and considering the request made by the petitioner, on 30-12-98 the respondent Bank sanctioned an over-draft limit of Rs.50,00,000/-for the purpose of business development against personal guarantee and mortgage of immovable properties belonging to the partners of the firm. It is also averred that after availing the said loan facilities the applicant firm repaying the amounts regularly and*

thereafter upon the demand made by the respondent Bank, the applicant offered additional security of the immovable property of four Flats each admeasuring a total area of 1650 sq.ft., out of total land admeasuring 691 sq.yds., situated in Sy.No.52,138 & 139 of Yousufguda, Hyderabad and got registered the mortgage in favour of the respondent Bank on 14-6-2002. Further it is stated that as on 14-6-2002, the day on which the petitioner executed the mortgage deed in favour of the respondent Bank, the outstanding liability of the applicant is only Rs.43,47,015/- and the clause 10 of the said agreement entitles the petitioner to get release of the property so mortgaged to the Bank upon the payment of 25% of the outstanding amount. It is also averred that adhering to the terms of the mortgage deed the petitioner paid the amounts and wrote letters to the respondent Bank on 15-7-2002 and 21-10-2002 requesting them to release the property and that the respondent had appropriate the amounts but not released the property as per the agreement. However, on repeated requests, on 15-4-2004 the respondent Bank got released two Flats for the payments made by the petitioner on 21-10-2002. The petitioner further states that having received the amounts, violating the terms of the agreement entered between the parties, abusing the powers conferred to the Bank under

the Act, the respondent Bank got issued notice under Section 13(2) of the Act for recovery of purported outstanding of Rs.25,69,897/- on 25-4-2003 and subsequently, the possession notice dated 25-8-2004 under Section 13(4) of the Act was also served on the petitioner. Aggrieved by the notice under Section 13(4), dt.25-8-2004, the petitioner had filed an application vide S.A.No.85/2004 before the Debts Recovery Tribunal, Hyderabad, on the ground that the said account does not fall under the category of NPA so as to enable the respondent Bank to initiate the recovered proceedings contemplated under the Act. The said S.A.No.85/2004 was partly allowed by the Debts Recovery Tribunal, Hyderabad on 5-10-2005 by setting aside the proceedings taken up by the respondent under Section 13(4) of the Act, but however, it was made clear that the demand notice issued under Section 13(2) holds good in law and that the respondent may take up proceedings that arise after 13(2) of the Act afresh. It is also stated that as against the order of the Debts Recovery Tribunal, Hyderabad in S.A.No.85/2006, the petitioner had preferred an appeal to the appellate authority on the ground that the ground on which the application is filed i.e., the very jurisdiction of the respondent to categorise

the account as NPA and to initiate proceedings under the Act has not been adjudicate by the Debts Recovery Tribunal, Hyderabad and other consequences for such non-adjudication which are raised before the Tribunal and that upon hearing the arguments, the Debts Recovery Appellate Tribunal, Chennai made it clear that the petitioner is at liberty to raise all the contentions, which they have already raised and they are entitled to raise further contentions on the measures that would be taken by the respondent under Section 13(4) of the Act and they would not be precluded at all from raising all the contentions and granted costs by its order dated 26-10-2006 in RA.42 (SERFAESI) of 2006. Obliging the orders of the Appellate authority, the petitioner had given a letter to the respondent and reminded on 19-12-2006 for payment of the costs of Rs.1,29,000/- and that the respondent Bank is in receipt of the letter, however till date had not paid any amount nor communicated anything to the petitioner and therefore the inaction of the respondent for not paying the costs though ordered by the appellate authority itself shows carelessness and negligence attitude towards the orders of the Tribunal. Further it is also stated that having suffered with an order to initiate steps under Section 13(4) of the Act, the respondent had invoking rights under Section 14 of the Act would itself

shows the intention of the Bank to harass the petitioner. It is also stated that the action of the respondent in approaching the Court of Chief Metropolitan Magistrate under Section 14 of the Act without first taking recourse to Section 13(4) of the Act is arbitrary and illegal and violative of principles of natural justice and that as per the Act it is mandatory that the action under Section 14 must be preceded by notice under Section 13(4) of the Act. Further it is stated that the respondent should have seen that the earlier notice issued under Section 13(4) dated 25-8-2004 was set aside by the Debts Recovery Tribunal, Hyderabad and the same was upheld by the Debts Recovery Appellate Tribunal, Chennai and that it was also further observed by the Appellate Tribunal in its order dt.26-10-2006 that the petitioner is always at liberty to raise all the contentions, which they have already raised and they are also entitled to raise further contentions on the measures that would be taken by the respondent under Section 13(4) of the Act and they would not be precluded at all from raising all the contentions and this shows that there is a specific direction to the respondent to issue notice under Section 13(4) of the Act giving an opportunity to the petitioner and that therefore, not following the same has resulted in violation of the

petitioner valuable right of defence. The respondent Bank is obligated to pay the costs of the application as directed by the Appellate authority and that without adhering the orders/directions of the Appellate authority issuing notice under Section 14 of the Act is contrary to the direction of the Tribunal and liable to be set aside. Section 19 of the Act contemplates the right of the borrower to receive the compensation and costs where the rules and measures are not followed by the secured creditor in accordance with the provisions of the Act. In the instant case both the Tribunals held that the measures taken by the respondent Bank were not in accordance with the provisions of the Act, accordingly set aside the same by directing the respondent Bank to pay the costs and however, the respondent Bank contrary to the provisions of the Act and the orders of the Tribunal initiated proceedings for purported recovery of the amount under Section 14 of the Act are liable to be quashed. Section 19 of the Act reads as hereunder:-

> ***"Right of borrower to receive compensation and costs in certain cases:-*** *If the Debts Recovery Tribunal or the Court of District Judge, on an application made under Section 17 or Section 17A or the Appellate Tribunal or the High Court on an appeal preferred under Section 18 or Section 18A, holds that the possession of*

secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder and directs the secured creditors to return such secured assets to the concerned borrowers, such borrower shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in Section 18B."

Further it is stated that the order passed by the Chief Metropolitan Magistrate under Section 14 of the Act cannot be called in question before any Court, more particularly before the Debts Recovery Tribunal under Section 17 of the Act and hence the petitioner has no other alternative remedy except to approach this Court.

Section 17 of the Act deals with ***Right to appeal*** reads as hereunder:-

"Right to appeal:- *(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-Section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measures had been taken.*

Provided that different fees may be prescribed for making the application by the borrower and

the person other than the borrower.

Explanation:- *For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-Section.*

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-Section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-Section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, the require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-Section (4) of Section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as

the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-Section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period of reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery

Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

In such circumstances, being left with no other alternate, it is stated that the writ petitioner approached this Court.

16. In the counter affidavit filed almost similar averments were made as made in W.P.No.6846/2007. It is stated that *without prejudice to the above contentions, it is submitted that the petitioner approached the respondent Bank and requested to sanction loan of Rs.50.00 lakhs for development of their construction business and accordingly, the respondent Bank sanctioned loan for an amount of Rs.50.00 lakhs in their favour and that as security for the loan, the petitioner executed a Mortgage Deed on 14-6-2002 in favour of the Bank mortgaging the semi-finished flats situated on the northern side of I Floor, II Floor and V Floor and the Flat situated on the southern side of the V Floor each admeasuring 1650 sq.ft., along*

with undivided share of land admeasuring 276.4 sq.yards out of total land admeasuring 698 sq.yards in 'Murthy Mansion' in the premises MCH No.8-3-167/D/19 in S.Nos.52, 138 and 139 situated at Yousufguda, Hyderabad and also stated that at that particular point of time, Flat numbers were not assigned as they were in semi-finished stage. Further it is also stated that in the mortgage deed, the Floor numbers were counted as Stilt plus five upper floors as stated by the petitioner and that in the mortgage deed it was agreed that the mortgagee i.e., the respondent Bank would release one Flat on payment of 25% outstanding loan, including interest as on the date of payment and accordingly, on payment of certain amounts, out of the four Flats mortgaged, the Flat on the northern side of I Floor and the Flat on Southern side of V Floor (two flats) were released on 15-4-2004. It is also further stated that that the petitioner sold Flat No.102 in II Floor on Northern side of 'Murthy Mansion' admeasuring 1650 sq.ft. together with proportionate undivided share in the land measuring 49.3 sq.yds., in the premises bearing MCH No.8-3-167/D-19 on Plot No.19 situated at Kalyan Nagar, Yousufguda, Hyderabad to one S.Ravi Kanth by way of registered sale deed dated 28-10-2002 and also stated that the above Flat was mortgaged on 24-6-2002 in favour of the respondent Bank along with other properties

as security for the loan taken by the petitioner through registered mortgage deed document No.1980/2002 dated 14-6-2002 registered in the Office of the Sub-Registrar, Banjara Hills, Hyderabad. Further it is also stated that during the subsistence of the above mortgage, the petitioner sold the said flat to one S.Ravi Kanth on 28-10-2002 and that therefore, the petitioner is not entitled to question the action of the respondent Bank in issuing Possession Notice and proceeding under the Act for recovery of the loan amount. The petitioner knowing fully well that the above Flat was mortgaged in favour of the respondent Bank, sold the said Flat. It is further stated that the petitioner filed this Writ Petition questioning the action of the respondent Bank in filing Crl.M.P.No.954/2002 before the Chief Metropolitan Magistrate, Hyderabad on the ground that the respondent Bank without first taking recourse to Section 13(4) of the Act, filed the above Crl.M.P. and it is stated that that as per Section 13(2) of the Act, a notice has to be issued by the respondent Bank to borrower to discharge his debt within sixty days from the date of notice, failing which the Bank is entitled to exercise all or any of the rights under sub-Section (4). Further it is stated that the respondent Bank issued notice to the petitioner under Section 13(2) of the

Act on 25-4-2003 and that the petitioner did not repay the loan amount even after receiving the said notice and that therefore, the respondent Bank issued Possession Notice under Section 13(4) of the Act on 25-4-2004. It is also stated that the petitioner filed S.A.No.85/2004 before the Debts Recovery Tribunal, Hyderabad and that the Debts Recovery Tribunal by orders dated 5-10-2005 in S.A.No.85/2004, set aside the Possession Notice dated 25-8-2004 issued by the respondent Bank on the ground that the said Notice is not published in the Newspapers as required under Rule 8(2) of the said Act, but, however, the Debts Recovery Tribunal made it clear that "the Demand Notice issued under Section 13(2) holds good in law and that the respondent may take up proceedings that arise after 13 (2) of SARFAESI Act afresh." Further it is stated that questioning the orders dated 5-10-2005 passed by the Debts Recovery Tribunal, in S.A.No.85/2004, the petitioner filed R.A. (SARFAESI) 42/2006 before the Debts Recovery Appellate Tribunal at Chennai and the Debts Recovery Appellate Tribunal by order dt.26-10-2006, set aside the order of the Debts Recovery Tribunal passed in S.A.No.85/2004 with regard to costs alone and held that the appellants in R.A., are entitled to costs and that the remaining part of the Order dated 5-10-2005 passed by the Debts Recovery Tribunal, Hyderabad in

S.A.No.85/2004 was not disturbed by the Debts Recovery Appellate Tribunal. Thereafter, the respondent Bank authorities visited the secured assets on 27-12-2006 to take physical possession of the secured assets and that the petitioner prevented the Bank authorities to take the possession of the secured assets, then the respondent Bank filed Crl.M.P.No.954/2007 before the Chief Metropolitan Magistrate, Hyderabad, in which the Chief Metropolitan Magistrate had passed the orders on 16-3-2007 appointing an Advocate Commissioner to take over possession of the above properties. It is also stated that the respondent Bank received information that the Advocate Commissioner served notices to the petitioner and also on one S.Ravikanth, who purchased one of the Flats from the petitioner. Further it is stated that questioning the action of the respondent in filing the above Crl.M.P. before the Chief Metropolitan Magistrate and also questioning the orders dt.16-3-2007 passed by the Chief Metropolitan Magistrate in the above Crl.M.P., the petitioner filed the present Writ Petition on the ground that without taking recourse under Section 13(4) of the Act, the respondent Bank filed the above Crl.M.P. and that this contention of the petitioner is not correct and misconceived. Section 13(4) of the Act and also Rule 8 of

the Rules of the Act had been referred to. It is also stated that *therefore, in view of the same, it is clear that only after taking possession of the property, notice is to be issued to the borrower and general public. It is also stated that this procedure is being adopted by all the Banks and Financial Institutions for realization of the loan amounts under the Act and that the respondent Bank will take steps under Rules 8 and 9 of the Rules framed under the said Act after taking possession of the property. It is also stated that the petitioner filed this Writ Petition on misconception that he is to be issued notice before taking steps under Section 13(4) of the Act, but nowhere in the Act, it is contemplated that notice is to be issued either to the borrower or to any person before taking steps under Section 13(4) of the Act. However, the Advocate Commissioner issued notices to the borrowers and also to the tenant of the petitioner's vendee, who is in possession of the said Flat.* In paras 13, 14 and 15 of the counter affidavit, similar averments as made in the counter affidavit in W.P.No.6846/2007 had been made.

17. Though specific stand had been taken that A.P.Mahesh Cooperative Urban Bank Ltd., does not fall under "State" within the meaning of Article 12 of the Constitution of India and the Writ Petition is not maintainable. For reasons best known, the standing

Counsel of the Bank had not addressed any arguments relating to the maintainability of the Writ Petition. Hence, this question need not detain this Court any further. The principal question which had been argued in elaboration is that whether an action can be initiated under Section 14 of the Act, without the same being preceded by a notice under Section 13(4) of the Act. Section 14 of the Act reads as hereunder:

> ***"Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of the secured asset:***
>
> *(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him…*
>
> *a) take possession of such asset and documents relating thereto; and*
>
> *b) forward such asset and documents to*

the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

18. Reliance was placed on the judgment of the Division Bench in Writ Appeal No.734 of 2007 and batch dated 13-09-2007. These writ appeals were directed against the orders made by the learned Single Judge where-under the interim order of Status Quo had been confirmed. The Division Bench while dismissing the writ appeals observed as hereunder:-

"The judgments of the Supreme Court and Madras High Court on which reliance has been placed by the learned counsel for the appellants, do not have any bearing on the adjudication of legality and correctness of the orders under challenge. I n ***M/S. MERDIA CHEMICALS v. UNION OF INDIA (2004) 4 SCC 311)*** *the Supreme Court considered challenge to the vires of some of the provisions of the Act and substantially negatived the same. In* ***M/S. TRANSCORE***

v. UNION OF INDIA (AIR 2007 S.C., 712) *the Supreme Court considered the inter relationship between the Act and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and held that the secured creditors can resort to both the enactments for recovery of their dues. In* ***SUNDARAM HOME FINANCE LTD. v. TEHSILDAR, HOSUR (2007 (1) D.R.T.C.592 (Mad)*** *the Division Bench of the Madras High Court held that once objection filed under Section 13(3) is overruled, there is no impediment in taking action under Sections 13(4) and 14 of the Act. In none of these cases, the Supreme Court and Madras High Court considered the legality and justification of interim order passed by the learned Single Judge in the proceedings initiated by the Bank and/or other secured creditor under Sections 13 and 14 of the Act.*

In the result, the appeals are dismissed. However, liberty is given to the appellants to make a request to the concerned Bench on 22-10-2007 for out of turn hearing of the writ petitions. We hope and trust that such request would receive sympathetical consideration.

As a sequel of dismissal of the writ appeals, W.A.M.P.Nos.1473 to 1478 of 2007 filed by the appellants for interim relief are also dismissed."

Reliance also was placed on ***GREATER BOMBAY CO-OP. BANK LTD. v. M/S.UNITED YARN TEX***

PVT.LTD. [1]***, M/S. TRANSCORE v. UNION OF INDIA &***

ANOTHER [2] it was observed at paras 55, 56, 57, 58 and 60 as hereunder:-

> *"The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property mortgaged and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt(charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals.*
>
> *Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as*

pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorized officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. I t inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of scale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorized officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorized officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor.(emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in

writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, nor in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorized officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorized officer before

issuance of sale certificate under Rule 9, the authorized officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorized officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorized officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the

authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules.

Whether ad valorem court fee prescribed under Rule 7 of the DRT(Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the NPA Act.

Mr. N.C.Sahni supplemented by Mr.Pankaj Gupta, learned advocates appearing on behalf of the borrower submitted that by virtue of the amending Act 30 of 2004 with effect from 11-11-2004, the persons aggrieved against the action of the bank or FI initiated under Section 13(4) of the NPA Act have a right to adjudication by way of an application to the DRT under Section 17(1) of the NPA ACT. It is submitted that in exercise of powers conferred under Section 40(1) of the NPA Act, the Central Government has issued an Order called the "Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest (Removal of Difficulties) Order, 2004("Order 2004") making the provision for levying of fees for filing of appeals. This Order 2004 was issued on 06-04-2004. It is further pointed out that on 08-04-2004, this Court delivered its judgment in the case of Mardia Chemicals (supra), Clause(3) of the Order 2004 provides that the fee for filing of an appeal to DRT under Section 17(1) of the NPA Act shall be mutalis mutandis as provided for filing of an application to DRT under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993("1993 Rules"). Learned advocates urged that after the amending Act 30 of 2004 which came into force with effect from 11-11-2004 by which amendment was made to Section 17(1) of NPA Act, the Order 2004 dated 06-04-2004 issued by the Central Government has become redundant because the amending provision stipulates filing of an application by the borrower under Section 17(1) of NPA Act to the DRT challenging the action under Section 13(4) by filing an application along with payment of fees as may be prescribed. Learned advocates submitted that under Section 17(1) of NPA Act, as amended, a proviso is added which states that different fees may be prescribed for making an application by the borrower. It is further submitted that the

word "prescribed" has been defined under Section 2(s) to mean prescribed by rules made under the NPA Act. It is urged that in the judgment of Mardia Chemicals(supra), this Court held that the remedy under Section 17 of NPA Act is not an appellate remedy. Clause (3) of the Order 2004 providing for fees for filing an appeal under the unamended provisions cannot, therefore, be made applicable to any application filed after 11-11-2004. Learned advocates submitted that NPA Act vide Section 17(1) of NPA Act read with Rule 7 of the 1993 Rules under DRT Act cannot form the basis to claim ad valorem court fee in terms of Rule 7 of the 1993 Rules, particularly after 11-11-2004 because, as stated above, this Court has held in Mardia Chemicals(Supra) that the remedy under Section 17(1) of NPA Act is the original remedy and not an appellate remedy. It is further submitted that after 11-11-2004, fees could be levied only vide Rules and not by an Order removing Difficulties.

It is true that Section 17(1) of the NPA Act states inter alia that a borrower aggrieved by action taken under Section 13(4) may make an application along with fees, as may be prescribed to the DRT having jurisdiction in the matter. It is true that, the marginal note states that Section 17(1) is a right to appeal. In our view, the marginal note to Section 17(1) cannot control

the text and the content of Section 17(1) which, as stated above, states that the borrower aggrieved by any of the measures in Section 13(4) may make an application to the DRT. The judgment of this Court in Mardia Chemicals(supra) states that the DRT acts in an Original Jurisdiction under Section 17 of the NPA Act. In our opinion, as far as the levy of fee is concerned, the terminology makes no difference. In fact, the proviso to Section 17(1) indicates that different fees may be prescribed for making an application by the borrower. The reason is obvious. Certain measures taken under Section 13(4) like taking over the management of the fee vis-à-vis the secured creditor taking possession of financial assets have to bear different fees. Each measure is required to be separately charged to the borrower(applicant) for which different fees could be prescribed. The said proviso indicates that the tribunal under Section 17(1) exercises Original Jurisdiction and, therefore, as far as the fees are concerned, the terminology of original or appellate jurisdiction in the context of fees is irrelevant. Secondly, under the Order 2004 issued by the Central Government under Section 40 of the NPA Act, it is provided that the fee for filing an appeal to the DRT under Section 17(1) of NPA Act shall be mutates mutandis as provided for filing an application to the DRT under Rule 7 of the 1993 Rules.

The word mutates mutandis indicates that a measure is adopted for assessing the fees required to be paid by the borrower when he applies by way of application to the DRT under Section 17(1) of NPA Act challenging the action taken under Section 13(4) of NPA Act by the secured creditor. Lastly, we do not find any merit in the argument advanced on behalf of the borrowers that since fees have not been prescribed by the rules after 11-11-2004, fees cannot be levied on the basis of the Order 2004 which was more prior to 11-11-2004. The contention of the borrowers is that since Section 17(1) of NPA Act, as amended, provides for prescribing fees for an application under Section 17(1) and since no rule has been framed under the NPA Act after 11-11-2004 fees cannot be levied under the Order 2004 dated 06-04-2004 which, according to the borrower, has come to an end after 11-11-2004 with the enactment of the amending Act 30 of 2004."

Further strong reliance was placed on the decision of the Division Bench of the Madras High Court in ***MISONS LEATHER LTD. v. CANARA BANK, REP. BY ITS CHIEF MANAGER***[3] wherein at paras 9, 10 and 11 it was observed as hereunder:-

"Relying on the above observations, it is contended that by virtue of amendment, the scope of Section 17 of the Act is restricted as to the compliance of the

provisions of the Act alone and various other grounds such as demand of amount has been recovered and failure to follow the mandatory guidelines of Reserve Bank of India and offer of one time settlement, calculation of interest and nature of secured creditors and all the incidental questions cannot be gone into by the Debt Recovery Tribunal.

We are afraid that the contention is totally misconceived. The provisions of Section 17(1) of the Act provide remedy for the borrower/guarantor/mortgagor to challenge the action of the Bank under Section 13(4) of the Act before the Debt Recovery Tribunal. The Debt Recovery Tribunal is required to decide whether the action of the Bank/Financial institutions, under Section 13(4) is in accordance with the provisions of the Act and the rules framed thereunder. It is open to the borrower/guarantor/mortgagor to demonstrate before the Debt Recovery Tribunal that resort to Section 13 of the Act is not permissible by law. In a given case, the claim of the Bank/Financial Institutions may be barred by limitation or there may be cases, where the adjustment of the amount paid is not reflected in the notice or the calculation of interest may not be in accordance with the contract between the parties. Needless to say that all such grounds, which render the action of the Bank/Financial Institutions illegal can be raised in the proceedings under Section 17

of the Act before the Debt Recovery Tribunal.

Learned Additional Solicitor General and the learned counsel appearing for banks and financial institutions fairly stated that all the objections which can be legally raised in the reply to the notice under Section 13(2) of the Act can also be raised in the proceedings under Section 17(1) of the Act. It would be for the Debt Recovery Tribunal to decide in each case whether the action of the bank is in accordance with the provisions of the Act and is legally sustainable."

"The challenge to the Act was set at rest by the Supreme Court in Mardia Chemicals v. Union of India, 2004(4) S.C.C. 311:2004(2) D.R.T.C. 107(S.C.) The following paragraphs of the above judgment are relevant:

> *In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Sec.13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Sec.13 in case of non-compliance with notice within 60 days. The creditor must apply its mind*

to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Sec.13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Sec.13. Such reasons, over ruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found

defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Sec.13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the Court. Such a person in respect of whom steps under Sec.13(4) of the Act are likely to be taken cannot be denied, the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the D.R.T. as provided under Sec.17 of the Act matures on any measure having been taken under sub-section (4) of

Sec.13 of the Act.

We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to the notice under Sec.13(2) of the Act, more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the Court to seek redressal but in the present case, in view of Sec.13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets, etc.

This will also be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly of the developments immediately before taking measures under sub-section (4) of Sec.13 of the Act. It will also cater to the cause of transparency and not secrecy and shall be conducive in building an atmosphere of confidence and healthy commercial practice. Such a duty, in the circumstances of the case and the provisions, is inherent under Sec.13(2)

of the Act.

However, to a very limited extent jurisdiction of the Civil Court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the Civil Court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely V.Narasimhachariar, A.I.R. 1955 Mad. 135, a judgment of the learned single Judge where it is observed as follows in para 22:

The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are two fold in character. The mortgagor can come to the Court before sale with an injection for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgage must

clearly disclose a fraud or irregularity on the basis of which relief is sought- Adams V. Scott, 1859(7) W.R. 213, 249. I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annual one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary – Law of Mortgages, Vol.II, 4th Edn., p.784)'.

In regard to the submissions made by the parties as indicated in the preceding paragraphs, we would like to make it clear that issue of a notice to the debtor by the creditor does not attract the application of the principles of natural justice. It is always open to tell the debtor what he owes to repay. No hearing can be demanded from the creditor at this stage. So far as the provision of appeal is concerned, we have already discussed in the earlier part of the judgment that proceedings under Sec.17 of the Act have been wrongly described as appeal before the D.R.T. It is in fact a forum where proceedings are originally initiated in

case of any grievance against the creditor in respect of any measure taken under sub-section(4) of Sec.13 of the Act. Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case."

The answer to the appellant's question is found in para 45 extracted above, which requires the creditor to apply its mind to the objections raised in the reply notice under Sec.13(2) of the Act. There must be some meaningful consideration of the objections and not a ritual rejection, to be followed up by the measures under sub-section(4) of Sec.13. If the Supreme Court had found on a reading of Sec.13(2) and Sec.13(4) that before proceeding under Sec.13(4) of the Act, a notice to be issued, the words "rather than to ritually reject them and proceed to take drastic measures…" would not have been made. Therefore, it is clear that the intention of the creditor to proceed against the assets unless a satisfactory objection is received from the borrower, is expressed only once and that is by the notice under Sec.13(2) of the Act. In fact, it is seen from a reading of para 45 above, that banks and financial institutions should apprise the borrowers of their reason for not accepting the objections or points raised in reply to the notice before proceeding to take measures under sub-section (4). These reasons over-ruling the objections of the borrower must also be

communicated to the borrower by the secured creditor. Section 13(2) calls upon the borrower to state his objections as to why measures shall not be taken under sub-section (4) of Sec.13. So, once those objections are overrules, the consequences follow. There does not appear to be an occasion for another notice informing the intent to proceed.

The words of the section and the law laid down in Mardia Chemical's case(supra) do not envisage a notice under Sec.13(4). Reasons for not accepting the objection are to be communicated before taking measures like taking over possession of the secured assets. This is the fairness that is required of the lender, but if the borrower has not responded to the notice under Sec.13(2), the lender has no occasion to communicate his reasons, necessarily the lender proceeds to the next stage. The borrower gets a right to challenge the action only after any of the measures contemplated under Sec.13(4) have been taken. It is clear from the paragraphs extracted above from Mardia Chemical's case that the communication of the reasons may not be taken to give an occasion to resort to such proceedings which are impermissible under the Act. A person who does not respond to the notice under Sec.13(2) of the Act should be considered to be aware of the consequences that will follow. In any event, it is not possible to hold that a borrower who has not responded to the notice under Sec.13(2) will be entitled to a notice under

Sec.13(4), whereas, in respect of a borrower who has responded to a notice under Sec.13(2) and has had the rejection communicated by the bank, the bank can proceed straightaway to take the measures contemplated under Sec.13(4). There is no room for visualizing two such courses of action. This will be reading words into the section, which the Legislature had not used. It is not our duty to legislate. The Supreme Court also was aware that "some of the provisions may be a bit harsh for some of the borrowers", yet has not, in its judgment, held that a pre-Sec.13(4) notice must be issued. We are unable to read a requirement of such notice either in the section or in the judgment.

In a different context, while dealing with the constitutional validity of the Terrorist and Disruptive Activities (TADA)Act, the Supreme Court observed that this kind of invocation of the provisions of TADA Act "in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police. Unless the public prosecutors rise to the occasion and discharged their onerous responsibility keeping in mind that they are prosecutors on behalf of the public, it cannot be said that the provisions of the TADA Act are enforced effectively in consonance with the legislative intent." Paraphrasing the same in the present context, we may say, therefore, "if invocations of the provisions of the Act in cases where it is not warranted or where it is unjustified are recklessly resorted to, it would amount to

flagrant abuse of the Act". Perhaps, it is this fear of possible abuse by the lenders that prevailed upon the learned single Judge to read into Sec.13(4), the requirement of a notice."

Further, reliance was placed on ***M/S. TRADE WELL, A PROPRIETORSHIP FIRM MUMBAI & ANOTHER v. INDIAN BANK & ANOTHER***[4] wherein it was observed that

"Sub-section (3) of S.14 is preceded by sub-section (2) under which for securing compliance of sub-section (1), that is for taking possession, the Chief Judicial/Metropolitan Magistrate or District Magistrate (CMM/DM) can take such steps and use or cause to be used, such force, as may in his opinion, be necessary. Sub-section (3) grants immunity to the CMM/DM as regards steps taken by him or force allowed to be used by him for providing assistance for taking possession. Since adjudication of rival claims is absent at that stage, there is no question of his dealing with rival claims and giving a reasoned judgment as regards the merits of the case and obviously there is no question of such a reasoning assuming finality. In any event, if a party has any grievance as regards contents of that order, his remedy would be voice them in the application u/S.17 before the DRT after measures u/S.13(4) are taken. Section 14 does not contemplate any notice to the borrower or a third party. It is only Section 17 which states that any person including borrower can make an

application to DRT being aggrieved by any measure taken u/S.13(4). Explanation to Section 17 clarifies that reasons communicated to a borrower at the stage of communication will not confer on the person including borrower any right to make an application to DRT u/S.17(1). Section 18 again confers right on any person aggrieved by an order of DRT u/S.17 to file an appeal before the Appellate Tribunal against the said order. Therefore, third party was in the mind of legislature when it enacted the Act. Wherever necessary reference is made to third party. Nothing prevented the legislature from specifically making a provision in Section 14 for notice to the borrower or third party. It purposely did not make provision for notice or hearing being given to the borrower or third party at the stage of Sections 14. Looking to the scheme of the Act, notice or hearing to the borrower or third party is excluded at the stage of Section 14 by necessary implication. However the bank or financial institution shall, before making an application u/S.14 of the Act, verify and confirm that notice u/S.13(2) of the Act is given and that the secured asset falls within the jurisdiction of CMM/DM before whom application u/S.14 is made. The bank and financial institution shall also consider before approaching CMM/DM for an order u/S.14 of the Act, whether Sec.31 of the Act excludes the application of Sections 13 and 14 thereof to the case on hand. CMM/DM acting u/S.14 of the Act is not required to give notice either to the borrower or to the 3rd party. He has

to only verify from the bank or financial institution whether notice u/S.13(2) of the Act is given or not and whether the secured assets fall within his jurisdiction. There is no adjudication of any kind at that stage it is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order u/S.14 of the Act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order u/S.14. Remedy provided u/S.17 of the Act is available to the borrower as well as the third party. Remedy provided u/S.17 is an efficacious alternative remedy available to the third party as well as to the borrower where all grievances can be raised."

19. Hence, in the light of the views expressed by the learned Division Bench of the Madras High Court and the learned Division Bench of the Bombay High Court, referred to supra, this Court is of the considered opinion that the stand taken by the writ petitioners in both these Writ Petitions cannot be held to be in affirmative in favour of the petitioners and hence, the same is hereby negatived. However, it is brought to the notice of this Court that a civil suit is pending and it is needless to say that the writ petitioner in W.P.No.6846/2007 is at liberty to pursue such remedy in accordance with law. Certain of the directions of the Debts Recovery Appellate Tribunal also need not detain this Court any longer for the reason

that this Court is inclined to follow the views expressed by the learned Division Bench of the Madras High Court and the learned Division Bench of the Bombay High Court as well, as specified above. Hence, viewed from any angle, the writ petitioners are not entitled to any of the reliefs prayed for in these Writ Petitions, but however, it is made clear that the petitioners are at liberty to pursue the other alternative remedies and also to pursue the suit said to be pending, and such proceedings to be decided on their own merits. Suffice to state that in the light of the respective stands taken by the parties, this Court is thoroughly satisfied that no relief as such can be granted in these Writ Petitions and these Writ Petitions are accordingly dismissed subject to the above observations. The non-payment of costs as per the directions of the DRAT also had been canvassed before this Court. It is needless to say that the parties are at liberty to pursue their remedies in accordance with law.

20. The Writ Petitions are dismissed accordingly. No order as to costs.

_____

Justice P.S.Narayana

December, 2007

NOTE:- L.R.Copy to be marked (YES / NO)

smr

[1] 2007(1) Decisions Today (SC)419

[2] AIR 2007 SC 712

[3] AIR 2007 MADRAS 268

[4] AIR 2007(NOC) 1634 (BOM) = 2007(3) AIR Bom.R.656(DB)